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January 3, 2007



Clerk of the Court  
Michigan Supreme Court  
Michigan Hall of Justice  
925 West Ottawa  
Lansing, Michigan 48915

**HAND DELIVERY**

Re: ADM File No. 2005-41

Dear Sir:

I am writing in opposition to Proposed Rule 19 of the State Bar of Michigan. My comments on this file are submitted in reliance on MCR 1.108(1), which permits filing on this date.

I am not an attorney. I am a citizen with over 30 years experience investigating bad lawyers as an investigative reporter and private investigator. My experience tells me that the Proposed Rule 19 would hurt the citizens of Michigan and undermine public confidence in the legal system.

Secrecy is a cancer on democracy and enemy of freedom.

The proposed rule is unnecessarily overbroad and it would seriously damage public confidence and trust in the judiciary and the legal profession.

The proposed rule adds governmental support to a widespread public perception that Michigan's legal system is an insider's closed club where protecting its members' personal welfare and fees is far more important than providing justice and protection for the ordinary citizen. I believe it is fair to say that most lay citizens believe the State Bar and Michigan's legal community is too slow, too secret, too soft and too self-regulated to effectively protect the public interest.

The public benefits from transparency, not secrecy. An open system is essential to demonstrate the fairness of the legal system and reduce public suspicion of it. What is needed in Michigan's legal system is less - not more - secrecy. When the system is closed to public scrutiny, respect for the rule of law deteriorates and freedom suffers.

The proposed rule would seal off from public access State Bar records concerning (a) Ethics Committee and Ethics Hotline programs, (b) the practice management resource center, (b) the Client Protection Fund, (c) investigation and enforcement activities relating to the Unauthorized Practice of Law program, and (d) records involving the success and/or failure of programs to treat judges and lawyers with substance abuse or gambling problems.

These programs do not deal with sensitive national nuclear defense programs. These are not records that would aid terrorists intent of harming American citizens.

What possible justification exists for the State Bar of Michigan to propose cloaking **the public's records** of these programs with secrecy?

It certainly cannot be to protect the public interest. The State Bar's proposed rule is clearly designed to limit public scrutiny of its programs and protect miscreants - fellow members of the legal club -- from public accountability for their conduct and actions. These files contain information valuable to the public in knowing how State Bar officials are doing – or not doing – their jobs. The public has a vested interest in knowing how these public servants and public programs work and whether they are an effective use of public funds.

The State Bar of Michigan is not a private club. The State Bar of Michigan is a "public body corporate" (MCL 600.901). It has been established that the State Bar is "a governmental agency for a specific purpose logically falling within scope of the judiciary." (*State Bar of Mich. V. City of Lansing* (1960) 105 N.W.2d 131, 361 Mich. 185.) That same decision also established that real and personal property of the State Bar "constituted public property belonging to the state."

**Likewise, the records of the State Bar of Michigan are public property that belongs to the citizens of Michigan.**

This is a government agency, authorized by state statute, and is subject to public scrutiny. All Michigan attorneys are required as a matter of law to be members of the State Bar of Michigan and to comply with its requirements. They are required as matter of law to pay compulsory "dues" – actually a state occupational license tax – in support of the organization in order to practice law in Michigan. The State Bar of Michigan manages net assets of nearly \$11.6 million. The funds that the State Bar collects and spends are public funds – and Michigan citizens are constitutionally guaranteed the right to know what is happening with those funds.

The overbroad proposed Rule 19 would allow the State Bar to shut off public access to records and prevent public oversight of how that money is spent and used on programs that exist to protect the public through the efficient and professional administration of justice.

The Michigan Department of Management and Budget and the *State of Michigan Financial Management Guide* on state government accounting and financial reporting each categorize the State Bar of Michigan as one of several “component units” in the *State Budget of Michigan*, in a class with other state government agencies such as the Mackinac Bridge Authority, the Michigan Economic Development Corporation and the Michigan Public Educational Facilities Authority.

According to the *State of Michigan Financial Management Guide*, “Component units are legally separate governmental organizations for which the State of Michigan’s elected officials are financially accountable.”

Public Act 431 of 1984 (MCL 18.1492) requires that the financial statements of all entities within the state’s reporting responsibility shall be included in the State of Michigan’s Comprehensive Annual Financial Report.

I believe that the Proposed Rule 19 casting a blanket secrecy order over State Bar records and requiring a court order for access to and examination of these records would interfere with the State of Michigan’s legal obligations to monitor the use state funds.

I also believe that the Proposed Rule 19 also would interfere with a Michigan’s citizens constitutionally-guaranteed rights under Article IX §23 of the Michigan Constitution to examine records relating to the use and expenditure of public funds. Article IX §23 states in part:

*“All financial records, accountings, audit reports **and other reports** of public moneys shall be public records and open to inspection.” (emphasis added)*

Clearly the use and expenditure of funds on any of the programs that the State Bar wants to cloak with secrecy will result in the creation of records that are subject to disclosure under this constitutional provision. These records may be as mundane as records of expenses involving bar ethics programs and unauthorized practice of law committee meetings. The Michigan Constitution, which was approved by the voters in 1963, reflects the express intent, will and statement of the citizens of Michigan and it cannot be overturned in any way by this Court. It is the supreme law of the State of Michigan, and the State Bar cannot dodge it by proposing a rule change.

It is also essential to recognize that the State Bar of Michigan is also a regulatory and law enforcement agency. State statute and Bar Rule 16 –approved by this Court - authorizes and empowers the State Bar to investigate and prosecute actions and proceedings involving the general public concerning the unauthorized practice of law

Protection of the public interest mandates that the State Bar's actions to police the unauthorized practice of law be open to scrutiny. This is necessary to both protect the public from charlatans with no legal education or training from preying on unsuspecting citizens, and also to protect the public from antitrust and improper restraint of trade actions by the legal profession to unfairly limit consumer choices or prevent competition. The United States Supreme Court has ruled in *FTC. V. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990), that there is no question that antitrust applies to the legal profession.

Likewise, it is critical to the public interest that actions involving the Client Protection Fund be open to public scrutiny. The Client Protection Fund is funded in part by bar dues – a state-mandated occupational license tax – to protect the public.

As this Court noted in its decision, *Falk v. State Bar of Michigan* (305 N.W.2d 201 (1981) ("Falk I")):

*"The client security fund...represents a discharge of duty to protect the public from recreant members of the profession...Support of the client security fund is but a logical and necessary extension of our admittedly imperfect regulatory and licensing standards and is a duty imposed on a profession committed to the public interest."*

In that same opinion, the court stated:

*"Similarly, the purpose of the Client Security Fund is not to insure attorneys for malpractice but to protect the public by reimbursing victims of a defalcation either by clients or lawyers or by a lawyer acting in a fiduciary capacity. Therefore, Lawyer Referral, Prepaid Legal Services and the Client Protection Fund clearly constitute a permissible public service, rather than a private or local service, within the meaning of Const.1963, art. 4 §30."*

In that same decision, this court spoke about:

*"...the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are....purposes in which the State of Michigan has a compelling interest..."*

Rule 1 of the State Bar Client Protection Fund Rules states in part:

*"The purpose of the Michigan Client Protection Fund [Fund] is to promote public confidence in the administration of justice and integrity of the legal profession..."*

**How can the public have any confidence in the administration of justice and integrity of the legal system if the State Bar is permitted to keep secret the records of the Client Protection Fund or any other programs aimed at protecting the public from attorney misconduct? SECRECY IS AN ENEMY OF PUBLIC TRUST IN JUSTICE.**

As Justice Kelly commented in a July 22, 2003 order authorizing the State Bar to raise dues, in part to fund the Client Security Fund and to support the attorney discipline system, the dues increase would “result in an organization that better represents its members and better serves the public at large.” (emphasis added) “The judiciary, the legal profession, and the general public can and should profit from a healthy, active state bar association.” (emphasis added). Order ADM File Nos. 2002-38 and 2003-14.

Michigan Courts have already established that attorneys bear special responsibilities to the public by reason of being licensed to practice law. *Maljak v. Murphy* (1970) 177 N.W.2d 228, 22 Mich. App. 380, affirmed 188 N.W. 2d 539, 385 Mich. 210).

Michigan courts have also ruled that an informed judiciary is wary of setting up attorneys as a privileged class divorced from the risks endured by those unable to call themselves “professionals.” *Metry, Metry, Sanon and Ashare v. Michigan Property and Cas. Guaranty Ass’n* (1977 261 N.W.2d 267, 79 Mich. App 226, affirmed in part, reversed in part 267 N.W.2d 695, 403 Mich. 117.

Finally, Michigan courts have taken notice that an “instrument drafted by attorney in his own favor is looked upon with suspicion.” *Matter of Estate of Barnhart* (1983) 339 N.W.2d 28, 127 Mich. App 381. Clearly, Proposed Rule 19 – which was crafted by attorneys in their own favor – should be looked upon with great suspicion.

**Any secrecy rules should be drawn as narrowly as possible.** For instance, I believe that State Bar records on substance abuse programs for judges and lawyers should be publicly available. It is essential that the public know if these programs are effective and properly managed. However, I believe it is acceptable to narrowly focus a secrecy exemption and protect an unwarranted invasion of personal privacy by redacting names and personal identifiers of individuals who have used or received treatment from those programs. But a blanket casting secrecy over the entire program unnecessarily limits public oversight.

As an American Bar Association panel that studied legal ethics and disciplinary issues asked in 1991:

“What does the public think of hearings behind closed doors? What does the public think when the disciplinary agency threatens the complaining

party with imprisonment for speaking publicly about the complaint? These do not sound like the judicial proceedings of a free society.”

The ABA has recommended strong medicine for the bar and the courts: Don't hide dirty laundry. Open up the process of investigating complaints against lawyers or risk ticking off a suspicious public. Open all records of complaints against lawyers. Open all hearings to investigate complaints.

In Oregon, the system has been wide open for over a generation. Every complaint against a lawyer is public record and every hearing is open for public scrutiny. Other states with open systems include Florida, and West Virginia. The sky has not fallen in on the legal profession in these states.

The opening web site of the State Bar of Michigan web site features a quote from Roberts P. Hudson, its first president. The quote states:

***“No organization of lawyers can long survive which has not for its primary object the protection of the public.”***

It is too bad that the administrators of the State Bar did not heed their own advice before submitting this badly flawed Proposed Rule 19 to the Michigan Supreme Court for its consideration.

Attached to my comments are recent editorials on this issue from the Detroit News and the Traverse City Record-Eagle. Both editorials express considerable misgivings about the wisdom of this proposed rule. I urge the justices of this Court to consider their comments.

It would be refreshing to see the Michigan Supreme Court not only discard and reject this badly flawed Proposed Rule 19, but on its own motion issue a rule preserving and enhancing public access to State Bar records in order to promote justice.

The citizens of Michigan deserve no less.

**PLEASE PRESERVE PUBLIC CONFIDENCE IN THE LEGAL AND JUSTICE SYSTEM OF MICHIGAN. REJECT PROPOSED RULE 19.**

**OPEN UP THE SYSTEM AND LET THE PUBLIC IN.**

Thank you,

A handwritten signature in black ink, appearing to read 'Patrick M. Clawson', with a stylized, sweeping flourish at the end.

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December 22, 2006

## Don't restrict access to reports on lawyers

Court order would be needed if State Bar gets its way

### The Detroit News

The public's access to information is fundamentally important in a system based on checks and balances. There are few instances where this is more vital than in the practice of law, especially as it relates to the actions of the people who argue for or against your fate or rule on it from the bench.

That's why it's critically important that the Michigan Supreme Court reject a proposed rule change that will be put before them on Jan. 17 that would restrict public access to information that's provided by the State Bar of Michigan.

If passed, the broadly written proposal would cut off the access to all records of the State Bar that relate to: Ethics complaints, the association's practice management resource center program, unauthorized practice of law program, client protection fund program and lawyers and judges' substance abuse and addiction assistance program.

Information would only be released if the State Bar was ordered by the court to comply after a hearing.

The State Bar argues that confidentiality is not guaranteed under the current system, but it's needed to protect the public, the lawyers and judges who administer these programs. Without guaranteed confidentiality, the Bar argues, people who make ethics complaints or file grievances about lawyers practicing illegally, for example, are subject to harassment or payback by those who find out they've been targeted.

In reality the rule change is nothing more than protection of the profession for lawyers and judges. With the exception of confidentiality for the program that helps those professionals and their families recover from substance abuse and addiction, all records should remain available.

Comments about the rule change can be made to the Michigan Supreme Court until Jan. 1. As of late last week, none had been filed with the court.

That's unfortunate, since public access to records is at stake. But it shouldn't stop the court from ruling against the proposal.

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### Be heard

An administrative hearing on the rule to restrict access to State Bar of Michigan information will be held at 9:30 a.m. on Jan. 17 on the sixth floor of the Michigan Hall of Justice, 925 W. Ottawa Street in Lansing. To reserve a place on the agenda, e-mail the Clerk of the Court at [MCS\\_clerk@courts.mi.gov](mailto:MCS_clerk@courts.mi.gov) no later than Jan. 15.

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12/23/2006

## Court shouldn't deny access to info

By Dawn L. Hertz

The Michigan Supreme Court has proposed a rule that would eliminate any access to records of the State Bar that relate to ethics complaints, the association's practice management resource center program, unauthorized practice of law program, client protection fund program and lawyers and judges' substance abuse and addiction assistance program.

Information would only be released if the State Bar was ordered by the court to comply after a hearing.

The proposed rule is but another in a series of disturbing actions by the Michigan Supreme Court to seal off public access to its operations.

See for example Administrative Order 2006-08 issued on December 8, 2006.

Freedom of expression is meaningless if the information needed to formulate an opinion is kept from us.

Thomas Jefferson said, "The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them." (Thomas Jefferson to Edward Carrington, 1787. ME 6:57).

Although public discourse is sometimes impolite, it is nonetheless only harmful if we allow it to be.

The response to despicable speech is more speech, denouncing the speaker, not less speech.

Outrageous speech should be put in its place by public disapproval, not by government censorship.

In order to utilize our right of free speech, we must be privy to the facts so that the speech is accurate and based on the truth, not on rumor.

We must shine the light of access upon the files of government so that scurrilous opinions of government actions can be exposed.

One cannot criticize nor defend our public institutions if we are kept in the dark as to how they operate.

The attempt to seal off from public scrutiny investigations by the State Bar of Michigan into allegations of

misconduct or drug abuse by judges, prosecutors and other publicly paid members of the bar should be anathema to anyone who believes in democracy and the public's right of free speech.

These files may contain important information on how public servants perform their positions of trust.

Public trust in the legal profession is essential to the functioning of a civilized society.

This proposed rule should be rejected.

**About the author:** Dawn L. Hertz is Of Counsel to the firm of Butzel Long and serves as General Counsel to the Michigan Press Association.

**About the forum:** The forum is a periodic column of opinion written by Record-Eagle readers in their areas of interest or expertise. Submissions of 500 words or less may be made by e-mailing [letters@record-eagle.com](mailto:letters@record-eagle.com). Please include biographical information and a photo.

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